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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 282

UNITED STATES OF AMERICA, PETITIONER

v.

ROGUE RIVER TRIBE OF INDIANS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 3, 1950, by the United States Court of Claims.

OPINIONS BELOW

The first opinion of the Court of Claims (R. 68–75) is reported in 105 C. Cls. 495. Its final opinion (R. 90–100) is reported in 89 F. Supp. 798.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1950 (R. 103–104). On June 23, 1950, this Court extended the time for filing this petition to and including August 30, 1950 (R. 107). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the court below employed an improper basis of valuation.

2. Whether there was a taking of Indian lands under the Fifth Amendment or merely a breach by the United States of a contract to sell Government lands for Indian benefit, in which case allowance of interest from the date of breach is improper.[1]

TREATY INVOLVED

The pertinent provision of the Treaty of November 29, 1854, 10 Stat. 1125, reads as follows:

> ARTICLE FIRST. The confederate bands of Umpqua and Calapooia Indians cede to the United States all their country included within the following limits, to wit: [here follows land description].
>
> Provided, however, that so much of the lands as are embraced within the following limits, shall be held by said confederated

[1] If review is granted additional questions will be presented as follows: (1) Whether the court below erred in holding that general, nomadic occupancy of the reserved area by the Indians is sufficient to constitute that area a "particular" tract "then actually occupied by said Indians," within the meaning of the proviso to Article 1 of the treaty; and (2) whether, even if there was a taking under the Fifth Amendment, the Court of Claims erred in mechanically allowing interest as an element of just compensation without consideration of the fact that the Government had fulfilled its obligation to the Indians to provide improvements on the new reservation otherwise than by sale of the lands, and without consideration of the benefits and expenditures made by the United States in behalf of the Indians.

bands, and such other bands as may be designated to reside thereupon, as an Indian reservation. To wit: [here follows land description]. And should the President at any time believe it demanded by the public good and promotive of the best interests of said Indians to be located elsewhere, the said Indians agree peaceably, and without additional expense to the government of the United States, to remove to such reserve as may be selected; provided that a delegation of three or more of the principal men of said bands selected by them, shall concur with the authorized agent or agents of the United States in the selection of said new reserve. And when said removal shall take place, the particular tracts then actually occupied by said Indians, on the reserve herein described, according to the provisions of this treaty, and those occupied by Indians of other bands that may be located thereon, shall be sold by order of the President of the United States, and the proceeds of such sales expended in permanent improvements on the new reserve, for the use and benefit of the holders of said tracts respectively.

STATEMENT

This action was instituted by numerous plaintiff bands of Indians pursuant to the Act of August 26, 1935, 49 Stat. 801, conferring jurisdiction on the Court of Claims to determine claims arising out of certain ratified treaties

which had been concluded with the plaintiff bands or tribes in 1853, 1854 and 1855. This petition is concerned with only the claim of the Confederated Bands of the Umpqua and Calapooia Indians arising from the Treaty of November 29, 1854, 10 Stat. 1125.[2]

Under Article 1 of that treaty (pp. 2–3, *supra*), these Indians ceded to the United States all lands claimed by them in the Oregon Territory. It was further provided that a described portion of the lands ceded containing about 67,820 acres "shall be held by said confederated bands [Umpquas and Calapooias] and such other bands as may be designated to reside thereupon, as an Indian reservation." The Indians further agreed to remove to another reservation should the President at any time determine that the public good or the best interests of the Indians would be thereby served, in which event the Government agreed that "the particular tracts then actually occupied by said Indians, on the [67,820-acre] reserve herein described, according to the provisions of this treaty, and those occupied by Indians of other bands that may be located thereon, shall be sold by order of the President of the United States, and the proceeds of

[2] This case is a companion case to *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, in which a petition for certiorari has been filed. Both have in common the question of whether the Court of Claims applied an improper standard of value.

such sales expended in permanent improvements on the new reserve, for the use and benefit of the holders of said tracts respectively."

By Article 3, the Government agreed to make specified annual payments for a period of twenty years, such payments to be expended for the use and benefit of the Indians. A further payment of $10,000 was provided for in Article 4, to be used for the Indians' benefit at the time of their removal to a new reservation. Article 5 authorized the President to make individual allotments to Indians, either on the reservation described in the treaty or on any reservation to which they might be moved. Under Article 6, the Government agreed to provide specific improvements, consisting of a blacksmith shop, a hospital, and a schoolhouse, and to provide professional services in connection therewith for a certain period of years.

A little over a year after the treaty was signed, the Umpqua and Calapooia Indians were removed from the 67,820-acre reserved area to the Grand Ronde Reservation (Fdg. 32, R. 57), this removal being influenced by the outbreak of the Rogue River War (Op., R. 91). Upon their removal, the United States did not sell "particular tracts then actually occupied by said Indians" on the 67,820-acre reserve for the purpose of providing improvements on the new reservation as contemplated by Article 1 of the treaty.

The Court of Claims, on the preliminary question of liability held that the Indians were en-

titled to just compensation under the Fifth Amendment for that portion of the 67,820-acre reserve which was "actually occupied by them at the time of their removal" (Conc., R. 68; Op., R. 71). The court found that there was no evidence in the record showing that any individual Indians of the tribes "had occupied any particular tracts" (Fdg. 32, R. 58).

The court nevertheless held that the whole of the 67,820-acre reserved area had been occupied by the Indians, within the meaning of the treaty provision. The court based that view on the proposition that the general character of occupancy by Indians who live by hunting and fishing was sufficient to make the reserve a "particular tract" "then actually occupied by said Indians" within the meaning of Article 1 of the Treaty (Fdg. 2, R. 78; Op., R. 91–92).

The court found that on December 21, 1855, the date of valuation, the 67,820 acres of land had a value of $67,820.00 or $1.00 per acre (Fdg. 12, R. 88). To this sum the court added interest for 79 years at 5% from December 21, 1855, to December 21, 1934, and for 15 years at 4% from December 21, 1934, to April 3, 1950, such interest totalling $309,357.16, making a total amount of $377,177.16 for the land. To this was added $14,315.88, an amount found to be due the Indians on the earlier hearing and not in question here, making a total of $391,493.04. Offsets amounting to $49,042.30 reduced the judgment to $342,450.74.

In addition, the court directed that from April 3, 1950, until the judgment is paid, interest should be paid at 4% on the 1855 value of $67,820.00 (Concl. of law, R. 89–90; Op., R. 99–100). The amount of the judgment, less attorneys' fees will, when deposited into the Treasury, bear interest at 4% under the Act of August 26, 1935, c. 686, sec. 4, 49 Stat. 801.

REASONS FOR GRANTING THE WRIT

1. If the Government's petition for certiorari on the value issue is granted in the companion case of *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, certiorari on that issue should be granted in this case since the questions are the same. Here the Court of Claims followed the pattern adopted in the *Alcea* case. In fact, the court below used the $1.20 per acre value in Alcea as a standard of comparison and concluded the Rogue River land was worth 20 cents less per acre because "the valuable timber which covered most of the tract and was of the same general character as that found on the Alcea tracts, was not as accessible, there was no gold or coal actually mined on the tract, and the commercial potentialities were not as attractive as on the Alcea tract with its several ocean harbors" (Op., R. 92–93, 99). It follows that if the $1.20 value found in Alcea is based on an erroneous standard, the same is true of the $1.00 value in this case.

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There is also present a secondary question of valuation in this case. The court below valued the 67,820 acres as if the Indians owned a full, unencumbered fee when, in fact, if they had any title at all, it was qualified by the Government's right to move other tribes onto the land, thus reducing the area they might "actually" occupy and correspondingly reducing the Government's obligation to them upon their removal to another reservation.

2. The court below held that respondents were entitled to recover the 1855 value of the 67,820-acre reserve, plus interest at specified rates from that year forward to the date of judgment. In doing so, the court regarded the lands as having been "reserved" by the Indians from the cession embraced in the treaty (Concl. of Law, R. 68). "They ceded certain of the lands owned by them and *retained other lands described in such treaty*" (Op., R. 71). The court held that when the Indians were removed from the 67,820-acre reserve, and the Government failed to sell the lands as provided in the treaty, there was a taking compensable under the Fifth Amendment, and allowed interest as an element of just compensation. Thus, the 1855 value of $67,820 was inflated to approximately six times that amount by the addition of interest totalling $309,357.16. The court rejected the Government's contention that

the Government was liable at most for a breach of the contract to sell the lands actually occupied by the Indians and that therefore interest was not allowable. If the 67,820 acres were ceded to the United States, then there was of course no taking of property of respondents when they were removed from that area. The Government believes the court was in error in holding that the 67,820 acres were not ceded to the United States.

The Treaty of November 29, 1854, 10 Stat. 1128, is one of a series negotiated with various bands of Indians in Oregon Territory pursuant to the Act of June 5, 1850, 9 Stat. 437. Section 1 of that act authorized the President to appoint commissioners "to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains." The Act expresses a twofold objective, the extinguishment of the Indians' land claims in the area west of the Cascades, and removal of the Indians themselves to the east of these mountains.

Initially, a series of nineteen unratified treaties were negotiated in 1851 with various bands or tribes of Indians in Oregon, the first six by commissioners appointed under the above-cited statute, the remaining thirteen by Anson Dart, Super-

intendent of Indian Affairs for Oregon Territory.[3]

While these treaties are not directly here involved, it is noteworthy that eight of the nineteen contained express reservations of lands from the cessions to be made by the Indians. For example, by Article 3 of the Treaty of April 16, 1851, with the Santiam Band of the Calapooya Tribe, the Indians ceded to the United States certain described lands "Except the reservation hereinafter set forth." And Article 4 provided that "said Band, or Tribe, shall reserve to their own use, and control, within the bounds above set forth, with the provisions hereto annexed, the lands in the following bounds," etc. These reservations by the Indians from their cessions of lands west of the Cascades were contrary to the objective of the statute under which they were negotiated. Thus, in transmitting the treaties to the Secretary of the Interior, the Commissioner of Indian Affairs expressed himself in general terms as being unable to express "a confident opinion respecting their merits" and further observed that the treaties "contain provisions of doubtful expediency." Such generalizations were particularized by the Secretary in his letter transmitting the treaties to the President, wherein he stated that "The provisions referred to by the Commissioner as being

[3] These unratified treaties are listed on page 21 of Exec. Doc. No. 25, 53d Cong., 1st sess., and the treaties themselves are on file in the National Archives and Records Service, Division of Legislative Reference and Records.

of doubtful expediency, I understand to be those relating to the reservations of particular districts for the residence of the Indians near the settlements of the whites." (Sen. Ex. Doc. No. 25, 53d Cong., 1st sess., pp. 20–21.) It was thus recognized that the treaties, in so far as they allowed the Indians to withhold part of their lands from the cessions and did not require complete relinquishment of the Indians' claims, were contrary to the statute under which they were negotiated. While the precise reason for nonratification of these treaties cannot be fixed, it is significant that the shortcomings of the treaties were brought to the attention of the Senate by the President, since he transmitted with the treaties the letter of the Secretary in which those shortcomings were emphasized (App., *infra,* p. 19). In any event, this history shows, first, that exceptions or reservations of lands from the cessions were recognized as being contrary to the policy of the 1850 statute, and these early treaties themselves show that where it was intended that the Indians reserve lands from the cession, express and unmistakable language was employed to that effect.

Subsequently, as the court below sets out (Fdg. 4, R. 30), six treaties were entered into with the plaintiff tribes in this case, and all six treaties were ratified. The Treaty of September 10, 1853, with the Rogue River Tribe, 10 Stat. 1018; the Treaty of September 19, 1853, with the Cow Creek Band of Indians, 10 Stat. 1027; the Treaty of

November 18, 1854, with the Chasta, Scotons, and Grave Creek Bands of Indians, 10 Stat. 1122; the Treaty of November 29, 1854, with the Umpquas and Calapooias, 10 Stat. 1125 (the treaty here involved); the Treaty of January 22, 1855, with the Willamette Valley Bands, 10 Stat. 1143, and the Treaty of December 21, 1855, with the Mo-lal-la-las or Molel Tribe, 12 Stat. 981. These six treaties were negotiated for the Government by Joel Palmer, Indian Superintendent who succeeded Anson Dart in that office. It will be observed that three of them were entered into before the Treaty of November 29, 1854, with the Umpquas and Calapooias, here involved, and two after that treaty was negotiated.

Mere examination of the five treaties other than the Umpqua and Calapooia treaty makes it clear that the Indians were not permitted to except any of their land from the cession. Thus, by Article 1 of the Rogue River Treaty, 10 Stat. 1018, the Indians ceded "all their right, title, interest, and claim" to a described area. By Article 2, the Indians were given only the right "to occupy temporarily" a described portion of the ceded area "until a suitable selection shall be made by the direction of the President of the United States for their permanent residence * * *." Similarly, by Article 1 of the Treaty of September 19, 1853, 10 Stat. 1027, the Cow Creek Band ceded "all their right, title, interest, and claim, to all the lands" therein de-

scribed. By Article 2, the Indians were "allowed to occupy temporarily" a described portion of the ceded area until a permanent residence was selected for them. By Article 1 of the Treaty of November 18, 1854, 10 Stat. 1122, the Chasta, Scotons and Grave Creek Bands ceded "all their country" as described and agreed to remove immediately after ratification of the treaty to the Table Rock reservation, the one temporarily set up in the Rogue River Treaty. By Article 1 of the Treaty of January 22, 1855, 10 Stat. 1143, the Willamette Valley Bands ceded "all their right, title, and claim" to a described area, and under Article 2 were permitted only "to remain within the limits of the country ceded, and on such temporary reserves as may be made for them * * * until a suitable district of country shall be designated for their permanent home * * *." By Article 1 of the Treaty of December 21, 1855, 12 Stat. 981, the Mo-lal-la-las ceded "all their right, title, interest and claim" to a described area. And by Article 3, they agreed to confederate with the Umpquas and Calapooia Bands and remove to a new reservation on the Yamhill River.

It is thus clear that in five of the six ratified treaties, three of which preceded and two of which followed the treaty with the Umpquas and Calapooias, no title to any lands within the ceded area was permitted to remain or recognized as being in the Indians. Since all six treaties were ne-

gotiated by the same agent for the United States, pursuant to a statute which looked to complete extinguishment of Indian claims in Oregon, these five treaties are material in construing the sixth, the Treaty of November 29, 1854, which is here in question.

It is recognized, of course, that an exception could have been made with respect to the Umpquas and Calapooias. But as already noted (pp. 10–11, *supra*), when it was intended to except lands from the cession, as in the case of certain of the unratified treaties, that intention was made crystal clear. The treaty here involved lacks language supporting the view that the Umpquas and Calapooias were alone so favored as to be allowed to retain title to any part of their ceded lands.

By Article 1 of the treaty, the Umpquas and Calapooias "cede to the United States all their country included within the following limits * * *." Certainly, this language, in legal contemplation, surrendered to the United States whatever title the Indains had or claimed to the whole area described, including the 67,820 acres set up as a reservation, and this result should not be overturned unless there is language equally decisive in legal contemplation to except or reserve part of the lands from the cession.

Such language is not present in the provisions of the treaty setting up the reserve which the court below finds the Indians to have withheld

from the cession. The second paragraph of Article 1 opens with the following: "Provided, however, that so much of the lands as are embraced within the following limits, shall be held by said confederated bands, and such other bands as may be designated to reside thereupon, as an Indian reservation." It will be observed that this proviso completely lacks words showing an intention to except or reserve the area from the outright cession contained in the first paragraph. The words "reserve" and "except" nowhere appear in the proviso. It does not purport to deal in terms of title. It simply gives the respondents, and any other Indians designated by the United States, the same sort of residence or occupancy privileges as were accorded the Rogue River, the Cow Creek, and the Willamette Valley Bands or Tribes by the ratified treaties above discussed. Under the treaty the United States had the unqualified right to move other bands onto the 67,-820-acre reserve (Op., R. 91). If it had done so and thus confined the Umpquas and Calapooias to a smaller area, the sole obligation of the Government was to sell only "the particular tracts" "actually occupied" by the respondents and apply the proceeds to improvements on the reservation to which they might be removed. This right to cut down the area "actually occupied" by the respondents and thus reduce the obligation of the Government to respondents on their removal is irreconcilable with the idea that

the respondents retained a full compensable title in the reserved area. The intention and real object of the treaty was to give respondents no greater interest in the reserve than had been allowed the other tribes with which ratified treaties were negotiated, i.e., temporary occupancy until they might be removed elsewhere. The proviso in Article 1 requiring the Government to sell tracts actually occupied by the Indians at the time of their removal to provide improvements on the new reservation does not compel the conclusion that title was in the Indians. That provision was intended to do no more than to place the Indians in as good a position, with respect to improvements, on the new reserve as they were on the old reserve.

Finally, if such a vital exception had been intended in the case of the Umpquas and Calapooias, alone of all the plaintiff tribes with whom treaties were negotiated and ratified, it would be expected that Joel Palmer, who negotiated all six treaties for the Government, would not only have noted this sole exception, but would have felt impelled to explain it. However, it is clear that Palmer considered the arrangement made with the Umpquas and Calapooias as leaving in the Indians only temporary occupancy privileges similar to those which had been accorded the other tribes. In transmitting the Umpqua and Calapooia treaty to the Commissioner of Indian Af-

fairs one month after the treaty was negotiated, Palmer in his letter of December 29, 1854, referred to the 67,820-acre reserve agreed to in the following terms (Def. Ex. 27): "I have designated for these bands, a small temporary Reserve isolated from the settlements, and containing agricultural lands sufficient for their use, but they will necessarily be required to settle along the narrow River bottom and on small creeks too sparse to make it a desirable location; * * *."

It is submitted that the true construction of the treaty is that all of the lands of the respondents were ceded to the United States. This being so, there was no taking of Indian land for which compensation must be paid under the Fifth Amendment. The Government's sole liability to the Indians stems from a failure to carry out the contracted obligation to sell so much of the land of the United States, in the 67,820-acre area set up as a reserve, as was actually occupied by the Indians at the time of their removal. And it is well established that for breach of contract, absent a provision in the contract or a statute showing a contrary intention, interest cannot be charged against the Government. *Smyth* v. *United States,* 302 U. S. 329, 353; *Albrecht* v. *United States,* 329 U. S. 599, 605; *Angarica* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Co.,* 253 U. S. 330, 336.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1950.

APPENDIX

[Presidential letter of July 31, 1852; National Archives and Records Service, Division of Legislative Reference and Records]

WASHINGTON, *July 31st 1852.*

To the Senate of the United States:

I communicate to the Senate herewith for its constitutional action thereon, nineteen treaties negotiated by Commissioners on the part of the United States, with various tribes of Indians in the Territory of Oregon; accompanied by a letter to me from the Secretary of the Interior and certain documents having reference thereto.

MILLARD FILLMORE.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 282

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROGUE RIVER TRIBE OF INDIANS, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 282

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROGUE RIVER TRIBE OF INDIANS, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, The Confederated Bands of the Umpqua Tribe of Indians and the Calapooias residing in Umpqua Valley, pray that the petition for writ of certiorari to review the judgment of the Court of Claims entered in this case on April 3, 1950, be denied.

Opinion Below

The opinion of the Court of Claims (R. 90-100) is reported at 89 F. Supp. 798.

Jurisdiction

The judgment of the Court of Claims was entered on April 3, 1950 (R. 103-104). On June 23, 1950 this Court extended the time for filing the petition to August 30, 1950.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1255.

This Court has no jurisdiction to review the second question presented by the petition (Pet. p. 2) inasmuch as it was decided in an earlier case between the same parties (105 C. Cls. 495) and is now res judicata.

Questions Presented

The questions presented by the petition may be restated as follows:

1. Whether the final judgment in the earlier case providing for just compensation operates as res judicata and a bar to relitigation of the question of respondents' right to recover or whether it merely establishes the "law of the case".

2. If the latter, whether the prior decision of the Court of Claims that there was a taking of respondents' lands under the Fifth Amendment is so "clearly erroneous" as to warrant reconsideration at this time.

3. Whether the court below properly ascertained values.

Statute Involved

The pertinent portions of the Jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), Sep-

tember 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 29, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143), and December 21, 1855 (12 Stat. 981), may have against the United States; * * *

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.

Treaty Involved

The pertinent portions of the Treaty of November 29, 1854 entered into with The Confederated Bands of the Umpqua Tribe of Indians and Calapooias residing in the Umpqua Valley, 10 Stat. 1125, are set forth in the petition (Pet. pp. 2, 3).

Statement

The statement in the petition with reference to the ratified Treaty of November 29, 1854 is incorrect insofar as it suggests that "these Indians ceded to the United States all lands claimed by them in the Oregon territory" (Pet. p. 4). The 67,820 acres constituting the reservation were not ceded; they were in fact specifically excepted or reserved from the cession (see proviso to Article 1 of treaty, Pet. pp. 2-3; also Opinion of Court, R. 71).

The characterization of the first case (105 C. Cls. 495) as a preliminary one, that is, as being on the "preliminary" question of liability may be misleading (Pet. pp. 5-6). On February 4, 1946 the Court of Claims entered its final judgment holding that the respondents were entitled to recover a money judgment of $14,315.88 and just compensation for that portion of the reservation (sometimes referred to as Umpqua Reservation) which was actually occupied by them at the time of their removal by the United States (R. 68).

The court found as a fact that no other Indians were designated to reside on the Umpqua Reservation and that the respondents were, within the meaning of their treaty, in actual occupancy of all the land reserved to them in the first article of the treaty. (Finding 2, R. 77-80, 91). The Solicitor General accepted the decision in the first case and made no effort to obtain a review by the Supreme Court.[1]

The second case (the present one) proceeded under Rule 39(a) of the Court of Claims which provides for a separation of the issues relating to the right to recover from those relating to the amount of recovery.

Reasons for Denying the Writ

1. The earlier case did more than establish the "law of the case", it finally adjudicated the basic question of liability. It operates as a bar to relitigation of the question of respondents' right to recover. *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52; *Scriven* v. *North*, (C. C. A. 4) 134 Fed. 366; *Mayer* v. *White*, (C. C. A. 8) 12 F. 2d 710; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. See the recent case of *Dickinson* v. *Petroleum Conversion Corp.*, 94 L. ed. 280, which cites the *Hill* case with approval. See also Stern and Gressman, Supreme Court Practice, "Finality as to separable matters", pp. 63, 64.

The judgment in the earlier case was partly final and partly interlocutory. Upon findings of fact, which were made part of the judgment, the court determined as a matter of law, that certain of the plaintiffs were entitled to recover, but left the issue of the amount of recovery and the amount of offsets in the case of the Confederated Bands of the Umpqua Tribe of Indians and the Calapooias residing in

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[1] In the case of *United States* v. *Alcea Band of Tillamooks, et al.*, which arose under the same jurisdictional act, the Solicitor General sought and obtained a review of the question of liability. 329 U. S. 40.

Umpqua Valley (respondents) to future litigation (R. 68). The judgment of the Court of Claims was interlocutory only as to the separable issue of the amount to be paid; as to the issue of liability, it must be regarded as final, for purposes of res judicata. *Bee Mach. Co.* v. *Freeman*, C. C. A. Mass., 131 F. 2d 190, aff. 319 U. S. 448; *Tuolumne Gold Dredging Corp.* v. *Walter W. Johnson Co.*, D. C. Cal., 71 F. Supp. 111.

There is a difference between adherence to the law of the case and res judicata; "one directs discretion, the other supersedes it and compels judgment". *Southern R. Co.* v. *Clift*, 260 U. S. 316. See *U. S.* v. *U. S. Smelting Co.*, 94 L. ed. 488, 496.

"The general proposition that a judgment or decree of a court of competent jurisdiction between the same parties, and all parties privy thereto, upon the same issues, is, as a plea, a bar, or as evidence conclusive, is well settled. Whenever a cause has been once fairly tried, fully heard, and finally decided, upon its merits, by a competent tribunal, the same questions, as between the same parties or their privies in interest, ought not to be tried over again. They should be considered as forever settled. This rule is necessary for the repose of society." *General Chemical Co.* v. *Standard Wholesale Phosphate & Acid Works*, C. C. A. 4, 101 F. 2d 178, 182, quoting *Norton* v. *San Jose Fruit-Packing Co.*, C. C. A. 9, 83 F. 512, 514.

For more than a decade this case has made its slow way through the courts on the assumption (by all concerned) that Rule 39(a) of the Court of Claims, making the amount of recovery a severable matter, was a valid and salutary rule. It provides that "In every Indian case * * * the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its *judgment adjudicating that right*. If the court holds in favor of the plaintiff, the

judgment shall be in the form of an interlocutory order, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings * * *" (Italics supplied.)

The present case was heard under this rule and on February 4, 1946 the Court of Claims entered a final judgment dismissing the complaint as to two of the plaintiffs, concluding that six plaintiffs were entitled to recover money judgments and that respondents were entitled to recover for the taking of their lands; only the amount of respondents' recovery was reserved for further proceedings. (R. 67-68)

The judgment was entered after a long trial, the filing of an opinion, findings of fact and conclusions of law. The petitioner did not appeal to the Supreme Court from this judgment.

This presents a situation analogous to that passed upon by the Supreme Court in *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52. There the earlier decree dismissed the bill against several defendants and referred the cause to a Master to ascertain the amount due by the other defendants. From this decree the complainant prayed an appeal but failed to perfect it. The Master then took testimony upon the subject of the amount to be paid and made his report. This was confirmed by the court who ordered the remaining defendant to pay complainant a specified sum of money. From this second decree the complainant appealed and asked the court to consider the matters determined by the earlier decree. In refusing this request the court said:

> We are of the opinion that the [earlier] decree * * * was a final decree, * * * as to all matters determined by it, and that they are closed against any further consideration. It disposed of every matter of contention between the parties, except as to the amount of one item and referred the case to a Master

to ascertain that. It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy except as to that amount, and retained the case only as against the parties interested in that matter. The rights and liabilities of all the parties were in other respects determined.

But there was no adjudication as to the payment of the amount to be ascertained by the Master; and that remained unsettled. It was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of * * *. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment.

The mere fact that Rule 39(a) provides that the judgment "shall be in the form of an interlocutory order" does not make the judgment any less res judicata where it in fact determined the issue and settled the controversy. *Sewerage Commission of Milwaukee* v. *Activated Sludge,* 81 F. 2d 22; *Larkin Automotive Parts Co.* v. *Bassich Mfgr. Co.,* 19 F. 2d 944.

2. If the earlier case merely established the "law of the case," which we deny, the Court is nonetheless bound by the prior judgment. "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *Roberts* v. *Cooper,* 20 How. 467, 481; *U. S.* v. *Camou,* 184 U. S. 572,

574; see also *Eastern Cherokees* v. *U. S.*, 225 U. S. 572; *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 and *Illinois ex rel. Hunt* v. *Illinois Central Railroad Company*, 184 U. S. 77, 92.

The decision on a prior appeal of the same case is held to be the law of the case, the remedy of the party deeming himself aggrieved being to seek a rehearing. *Maryland Casualty Co.* v. *City of Norfolk*, (C. C. A. 4), 54 F. 2d 1032, 1039. While the doctrine of the law of the case is not a limitation of power, the decision on former appeal "must be followed in all subsequent proceedings . . . unless that decision is clearly erroneous and works manifest injustice". *Chicago, St. Paul , M. & O. Ry. Co.* v. *Kulp*, 102 F. 2d 352, cert. den. 307 U. S. 636.

The judgment in the first case (105 C. Cls. 495) was in no sense erroneous; it was clearly in accordance with the decisions of this Court. *Shoshone Tribe* v. *U. S.*, 299 U. S. 476, 497; *U. S.* v. *Creek Nation*, 295 U. S. 103, 110.

Under the ratified treaty of November 29, 1854 (10 Stat. 1125) the respondents ceded to the United States all of the land they had occupied from time immemorial except 67,820 acres which they retained as a reservation.

The 67,820 acres were reserved for the respondents and such other bands "as may be designated to reside thereupon". The treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted. *U. S.* v. *Winans*, 198 U. S. 371, 381.

The Court found as a fact (Finding 2, R. 77-80) that no other Indians were ever designated by the United States to reside on the reservation and that in fact no Indians other than the respondents occupied said land. The reservation was never ceded to the government; the govern-

ment confiscated it.[2] The opinion of the Court of Claims states: "According to the terms of that treaty the bands of Umpquas and Calapooias reserved a specifically described tract of land and ceded a portion of the land which they owned. Since by no act of theirs did they apparently surrender the occupied part of the reserved tract, we are unable to find that their simple removal deprived them of their rights as stipulated in the treaty" (R. 71).

Petitioner alleges that the United States is only liable for a breach of contract, that is, for failure to sell the land for respondents' benefit. The answer to this is that there was a taking by the United States of the Indians' land for public use and they are entitled to recover just compensation. The tribal lands, as we have said, were confiscated by the United States.

The decision of this Court in the *Shoshone* case, 299 U. S. 476, 497, is a complete answer on this point.

The opinion states in part:

> "* * * Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U. S. 553, 564-566, 47 L. ed. 299, 305, 306, 307, 23 S. Ct. 216. *The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that "would not be an exercise of guardianship, but an act of confiscation."'* United States v. Creek Nation, supra (295 U. S. 110, 79 L. ed. 1335, 55 S. Ct. 681); citing Lane v. Santa Rosa, 249 U. S. 110, 113, 63 L. ed. 504, 506, 39 S. Ct. 185; Cherokee Nation v.

[2] The accounting report filed November 15, 1944 in the first case (105 C. Cls. 495) p. 111 states "It was decided to remove them [respondents] and their whole country was considered as ceded."

> Hitchcock, 187 U. S. 294, 307, 308, 47 L. ed. 183, 190, 23 S. Ct. 115. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' * * *'' (Italics supplied).

The petitioner, beginning on page 9 of its petition, would like to retry the first case but has certified to this Court only the record in the second case. Petitioner desires to know: (1) why certain Indians were not moved east of the Cascades, (2) why the 1851 treaties were not ratified, (3) why other ratified and unratified treaties did not provide for permanent reservations, and (4) why certain exceptions were made in some of the treaties negotiated by Joel Palmer, Indian Superintendent.

These questions all involve respondents' right to recover which was adjudicated in the first case, and although quite immaterial can only be answered by reference to the record in the first judgment.

Petitioner's repeated references to other treaties, both ratified and unratified, are irrelevant and immaterial. As to certain other reservations created by other treaties being temporary the report of the Assistant Secretary of the Interior dated August 21, 1941 and filed in evidence by defendant in the first case had this to say:

> "In but one of the treaties were the Indians promised a reservation for their exclusive use (that of November 29, 1854). The other reservations were considered as temporary reservations and the lands were treated as ceded lands after the use for which they had been set aside had been made."

The ratified Treaty of November 29, 1854 is clear and unambiguous and needs "no other treaty history" to clarify its terms.

The cases cited by petitioner that interest cannot be charged against the government do not involve questions of

"just compensation". The instant case does not involve the recovery of interest as such.

The Supreme Court in *United States* v. *Klamath and Moadoc Tribes,* 304 U. S. 119, 123, stated:

> "* * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. * * *"

The amount sufficient to produce the full equivalent of the value paid contemporaneously with the taking has been determined by using a reasonable interest rate. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496, 81 L. ed. 360, 369; *Jacobs* v. *United States,* 290 U. S. 13, 17, 78 L. ed. 142, 144.

3. The petition fails to allege any errors of law committed by the court below in determining the value of the 67,820 acres as of December 21, 1855. Petitioner alleges that the Court of Claims used the value of $1.20 per acre in the *Alcea* case (Pet. p. 7) and concluded that the respondents' lands were worth 20¢ less. What the Court did was to consider all of the elements of value and determine that the respondents' land had a value of $1.00 per acre in 1855.

The judgment below was based solely on questions of fact; ordinarily this Court does not grant certiorari to review that type of judgment. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review . . . findings of fact by . . . courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.,* 336 U. S. 271, 275.

No such showing is made. In view of the statement (Pet. p. 7) that "if the $1.20 value found in Alcea is based on an erroneous standard, the same is true of the $1.00

value in this case"—it seems desirable to outline the extent and scope of the court's consideration of the question of value.

Both parties introduced the testimony of expert witnesses and much documentary evidence consisting of ancient documents, government reports, maps and histories.

The various elements of value offered by both petitioner and respondents related to circumstances existing in the area, and included the following: (1) the location of the lands and their physical characteristics; (2) the history of the Oregon Territory; (3) the development of the surrounding area at the time of the taking; (4) actual disposals of the tribal lands after the taking by the Government; (5) private sales of similar lands bordering on the Umpqua Reservation; (6) sales of land in the tribal area by the Oregon and California Railroad; (7) agricultural and timber value of the reservation (R. 93).

From this material the court made certain findings[3] and reached certain conclusions which may be summarized as follows (R. 77-89):

The tribal lands were located in the Umpqua Valley in Douglas County, Oregon. The Umpqua River enters the reservation near its southeast corner, flows through it in an irregular course to the north and northwest and thereafter empties into the Pacific Ocean. In the early history of Oregon the Umpqua River was an important avenue of transportation and second in importance in the state. It was navigable by ocean vessel from the ocean to Scottsburg which is about 20 miles from the reservation. The width of the river on the Umpqua Reservation is about 400 feet. (R. 80)

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[3] There were 13 separate findings of fact covering 15 printed pages.

While the greater part of the reservation is best adapted to the growing of timber, being located in what is known as the Douglas-Fir Region,[4] it contained some good agricultural and grazing land. The soil is fertile and well adapted to the growing of most farm crops, fruits and vegetables. There is an abundance of pure water, the climate is healthful and did not have extremes of heat and cold. (R. 80-81)

Settlement of Oregon Territory began in noticeable volume about 1838. Douglas County in which the tribal lands were located was created January 7, 1852. In 1860 the city of Roseburg, which was ten miles from the reservation, had a population of 835 people. Winchester, eight miles from the reservation, had a population of 412 people. (R. 81)

The roads in the tribal area in the early days were somewhat primitive. There was a pack trail from Scottsburg to Winchester and one along the Umpqua River running through the reservation. In 1856 General Sheridan constructed a useable road in the vicinity of the reservation for the purpose of moving ammunition and military equipment. (R. 81). In 1855 the Umpqua River could have been used for floating logs from the reservation to the Pacific Ocean but on account of certain rapids and shallow places between the reservation and Scottsburg in dry weather it would have been necessary to utilize splash dams. (R. 88)

By the Act of March 3, 1853 Congress authorized a survey for the purpose of ascertaining a feasible route for a railway from California to Oregon. The survey party passed through Douglas County in October, 1855 and the proposed route ran parallel to and about 12 miles from the reserva-

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[4] Douglas fir timber had a commercial value in 1855. (Finding 10, R. 87).

tion. By the Act of July 25, 1866 (14 Stat. 239) the Government made a grant of land to the Oregon and California Railroad Company as an aid for the construction of a railroad from California to Portland, Oregon. The railroad when constructed followed approximately the same route as was laid out in the survey of 1855. (R. 81-82)

The entire Umpqua Reservation lay within a portion of the "primary limit" lands granted to the railroad. Section 2 of the Act provided that the alternate sections of land retained by the Government would not be sold for less than $2.50 per acre. (R. 82)

Inasmuch as none of the land in the reservation was privately owned in 1855 there could be no sales between private buyers. There were sales of 63 tracts of land in Douglas County between April 1, 1856 and October 12, 1860 for an average price of $5.33 per acre. Twenty of these sales involved land located in townships adjoining the reservation and there were four sales of land in a township in which part of the reservation was located.[5] (R. 85)

The government withdrew from private entry approximately 31,000 acres of the tribal lands for land grants made to the Oregon and California Railroad Company. The act provided (16 Stat. 47) that the railroad might sell the lands granted to it, to settlers only, in quantities of not more than 160 acres to each purchaser and for a price not to exceed $2.50 per acre. The railroad violated the grant by selling at a price in excess of $2.50 per acre and a portion of the granted lands within the reservation were revested in the United States. (*Oregon and California Railroad Company* v. *United States,* 238 U. S. 393) (R. 82, 84).

The court concluded that in 1855 the reservation was

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[5] The four sales were in Township 25 S.R. 7 W. One deed is undated but two of the sales were made in 1857 and one in 1859. The average price per acre was $6.33. (Fuller Appraisal Plffs. Ex. 13).

located in an area where settlements on its edges were thriving and increasing in population. There was a demand for agricultural products and the timber of the area, and the court said "that if the timberlands on the reservation had been available and offered for sale by or around 1855, in tracts of sufficient size to attract the interest of lumber companies, most of the land would have been purchased particularly since people generally were aware of the promising future of the lumber industry in Oregon" (R. 98-99).

"From the record as a whole" the court concluded "that the lands taken had an average value of $1.00 per acre on December 21, 1855, taking into consideration the factors set forth above, the fact that some of the land was of little value then and today, and allowing for the reasonable costs of making all necessary surveys and supervising the disposition of the lands" (R. 99).

This may be in the nature of a jury verdict but that fact makes it all the more unassailable. *U. S.* v. *Wells,* 283 U. S. 102, 120.

Value depends on the circumstances of each case and no general formula can be used for the purpose. *U. S.* v. *Miller,* 317 U. S. 369, 374. In determining what property is worth the inquiry must be "viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted". *Miss. & Rum River Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. ed. 206, 208.

"Just compensation includes all elements of value that inhere in the property . . . The sum required to be paid . . . is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or

likely to be needed in the reasonably near future is to be considered . . . ". *Olson* v. *U. S.*, 292 U. S. 246, 255.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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